Aviosupport Corp (M) Sdn Bhd v Ministry of Education, Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12BNCvC-104–09 OF 2019
MOHD ARIEF JC
28 JUNE 2021

Contract — Agreement — Breach — Parties entered into security services agreement — Appellant claimed against respondents for deducted sums — Whether respondents had shown that appellant did commit breaches of agreement justifying deduction — Whether decision of Federal Court in Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd [2019] 6 MLJ 15 was applicable — Whether deduction was reasonable

The appellant and the second respondent entered into an agreement to supply security services (without any firearm) at the schools or institute of education under the purview of the Ministry of Education within the state of Selangor, the first respondent. Essentially, the appellant was unhappy with the decision of the first respondent that had retained and deducted the sums of RM281,000.92 from the contract sum. The said sums were allegedly deducted by the first respondent on the ground that the appellant had failed to comply with its contractual obligations and failed to provide the services that were directed by the first respondent. The first respondent alleged that the appellant had failed to undertake the directed services, which required a deduction of the sums to be paid to the appellant. In support, the respondents relied on the documents appearing in the record of appeal. These were the records incorporating the invoices, data clocking and minutes of meetings of the second respondent concerning the performance of the appellant. The learned sessions court judge dismissed the appellant's claim. Dissatisfied, the appellant filed this appeal against the decision. The issues for consideration were: (a) whether the respondents had shown that the appellant did commit breaches of the agreement justifying the deduction; (b) whether the decision of the Federal Court in *Cubic Electronics Sdn Bhd (In Liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15 ('Cubic') was applicable; and (c) whether the deduction was reasonable.

Held, dismissing the appeal with costs of RM10,000:

(1) The learned sessions court judge had not committed any form of error that justified appellate intervention on the issues posed by the appellant. SD2 and SD3 had stated in their evidence in chief that the appellant did commit breaches of the agreement and failed to provide services to the

satisfaction of the respondents. The appellant's sole witness under cross-examination admitted that there was evidence that the appellant did fail to comply with the terms of the agreement. Therefore, it could not be said unequivocally that the learned sessions court judge decision was perverse that no reasonable judge could have come to the same conclusion. The learned sessions court judge had erred in not marking the documents, inter alia, the timesheet or clock records prepared by the appellant into evidence as exhibits for the trial. The persons who had inspected and marked the documents, ie SD2 and SD3, were called to give evidence. Therefore, the fact that the headmasters were not called did not preclude the admissibility of this evidence under s 73A of the Evidence Act 1950. This was not a case where the documents marked as ID documents were not tendered through witnesses and were not subject to cross-examination by counsels. Therefore, the court was empowered under law, in particular, ss 69 and 23 of the Courts of Judicature Act 1964 to consider the documents that were earlier marked as IDD1 to IDD14 as part of the exhibits. The documents were correctly considered by the learned sessions court judge. As there were documentary and adequate oral evidence to support the decision of the learned sessions court judge, it would be inappropriate for the court to intervene in this case. As such the respondents had shown that on the balance of probabilities that the appellant did commit breaches of contract that justified the exercise of the second respondent's right to deduct 20% of the sums to be paid to the appellant (see paras 17–18, 20–21, 23–24, 27, 29–30 & 36–37).

(2) The Federal Court in *Cubic* did not make any new law but merely explained the workings of s 75 of the Contracts Act 1950. The court did not overrule the previous decisions of the Federal Court and did not hold that these cases as not being applicable post *Cubic*. The learned sessions court judge had correctly applied the law on this issue (see paras 40 & 42).

(3) The appellant had not shown why the deduction was not reasonable and why the learned sessions court judge got it wrong in this case. The substance of the appellant's arguments on this point lied substantially on pleadings and its position was erroneous (see para 48).

[Bahasa Malaysia summary

Perayu dan responden kedua telah menandatangani perjanjian untuk membekalkan perkhidmatan keselamatan (tanpa sebarang senjata api) di sekolah atau institut pendidikan di bawah bidang kuasa Kementerian Pendidikan Dalam Negeri Selangor, responden pertama. Pada asasnya, perayu tidak berpuas hati dengan keputusan responden pertama yang telah menahan dan memotong jumlah RM281,000.92 daripada jumlah kontrak. Jumlah tersebut didakwa telah dipotong oleh responden pertama atas alasan bahawa perayu telah gagal mematuhi obligasi kontraknya dan gagal memberikan

perkhidmatan yang diarahkan oleh responden pertama. Responden pertama mendakwa bahawa perayu telah gagal menjalankan perkhidmatan yang diarahkan, yang memerlukan potongan jumlah yang perlu dibayar kepada perayu. Sebagai sokongan, responden bergantung kepada dokumen yang terdapat dalam rekod rayuan. Ini adalah rekod yang menggabungkan invois, data jam dan minit mesyuarat responden kedua mengenai prestasi perayu. Hakim mahkamah sesyen yang bijaksana menolak tuntutan perayu. Tidak berpuas hati, perayu memfailkan rayuan ini terhadap keputusan tersebut. Isu-isu untuk pertimbangan adalah: (a) sama ada responden telah menunjukkan bahawa perayu melakukan pelanggaran perjanjian yang mewajarkan potongan tersebut; (b) sama ada keputusan Mahkamah Persekutuan dalam *Cubic Electronics Sdn Bhd (In Liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15 ('Cubic') terpakai; dan (c) sama ada potongan tersebut munasabah.

Diputuskan, menolak rayuan dengan kos RM10,000:

(1) Hakim mahkamah sesyen yang bijaksana tidak melakukan sebarang bentuk kesilapan yang mewajarkan campur tangan rayuan terhadap isu yang dikemukakan oleh perayu. SD2 dan SD3 telah menyatakan dalam keterangan utama mereka bahawa perayu telah melakukan pelanggaran perjanjian dan gagal memberikan perkhidmatan yang memuaskan hati responden. Saksi tunggal perayu di bawah pemeriksaan balas mengakui bahawa terdapat bukti bahawa perayu gagal mematuhi terma perjanjian. Oleh itu, tidak boleh dikatakan bahawa keputusan hakim mahkamah sesyen yang bijaksana adalah salah yang mana tiada hakim yang munasabah boleh membuat kesimpulan yang sama. Hakim mahkamah sesyen yang bijaksana telah terkhilaf apabila tidak menandakan dokumen, antara lain, jadual atau rekod jam yang disediakan oleh perayu sebagai keterangan sebagai ekshibit untuk perbicaraan. Mereka yang telah memeriksa dan menanda dokumen, iaitu SD2 dan SD3, dipanggil untuk memberi keterangan. Oleh itu, hakikat bahawa guru besar tidak dipanggil tidak menghalang kebolehterimaan keterangan ini di bawah s 73A Akta Keterangan 1950. Ini bukanlah kes di mana dokumen yang ditandakan sebagai dokumen ID tidak dikemukakan melalui saksi dan tidak tertakluk kepada pemeriksaan balas oleh peguam. Oleh itu, mahkamah diberi kuasa di bawah undang-undang, khususnya, ss 69 dan 23 Akta Mahkamah Kehakiman 1964 untuk mempertimbangkan dokumen yang sebelum ini ditandakan sebagai IDD1 hingga IDD14 sebagai sebahagian daripada ekshibit. Dokumen tersebut telah dipertimbangkan dengan betul oleh hakim mahkamah sesyen yang bijaksana. Oleh kerana terdapat keterangan dokumentari dan lisan yang mencukupi untuk menyokong keputusan hakim mahkamah sesyen yang bijaksana, adalah tidak wajar untuk mahkamah campur tangan dalam kes ini. Oleh yang demikian, responden telah menunjukkan bahawa pada

imbangan kebarangkalian bahawa perayu telah melakukan pelanggaran kontrak yang mewajarkan pelaksanaan hak responden kedua untuk memotong 20% daripada jumlah yang perlu dibayar kepada perayu (lihat perenggan 17–18, 20–21, 23–24, 27, 29–30 & 36–37).

(2) Mahkamah Persekutuan di *Cubic* tidak membuat apa-apa undang-undang baru tetapi hanya menjelaskan cara kerja s 75 Akta Kontrak 1950. Mahkamah tidak menolak keputusan Mahkamah Persekutuan sebelum ini dan tidak berpendapat bahawa kes-kes ini tidak terpakai selepas *Cubic*. Hakim mahkamah sesyen yang bijaksana telah menggunakan undang-undang dengan betul dalam isu ini (lihat perenggan 40 & 42).

(3) Perayu tidak menunjukkan mengapa potongan itu tidak munasabah dan mengapa hakim mahkamah sesyen yang bijaksana membuat kesilapan dalam kes ini. Isi hujah perayu mengenai perkara ini banyak berdasarkan pada pliding dan kedudukannya adalah salah (lihat perenggan 48).]

Cases referred to

Abdul Kudus Hj Abd Aziz v Normah bte Chik [2003] 6 MLJ 169, HC (refd)
Arab-Malaysian Merchant Bank Bhd v Chong On Foh Medical Hall [1997] 4 MLJ 532, HC (refd)
Chong Khee Sang v Pang Ah Chee [1984] 1 MLJ 377 (refd)
Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd [2019] 6 MLJ 15; [2019] 2 CLJ 723, FC (refd)
Imam-Ud-Din v Sri Ram Perbhu Dial (AIR) 1928 Label 142 (refd)
Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2009] 4 MLJ 445; [2009] 4 CLJ 569, FC (refd)
Joseph Thambirajah v Bank Buruh (M) Bhd [2008] 2 MLJ 773, CA (distd)
MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428; [2016] 4 CLJ 665, CA (refd)
Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors [2021] 3 MLJ 622; [2021] 4 CLJ 821, CA (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817; [1995] 2 CLJ 374, FC (refd)
Sin-Kung Logistics (KL) Sdn Bhd v Projek Lebuhraya Usahasama Bhd [1997] 1 MLJ 690; [2019] 10 CLJ 137, CA (refd)
Soo Hong & Leong Kew v UMBC [1997] 1 MLJ 690; [1997] 2 CLJ 548, CA (distd)
TH Properties Sdn Bhd & Anor v Knight Frank Malaysia Sdn Bhd [2021] MLJU 202; [2021] 1 LNS 134, HC (refd)
YB Dato' Hj Husam bin Hj Musa v Mohd Faisal bin Rohban Ahmad [2015] 3 MLJ 364; [2015] 1 CLJ 787, CA (refd)

Legislation referred to

Contracts Act 1950 s 75
Courts of Judicature Act 1964 ss 23, 29, 69
Evidence Act 1950 s 73A, 73A(2)

Mohan Ghandi (Mohan Ghandi) for the appellant.
Saravanan Kuppusamy (Federal Counsel, Attorney's General Chambers) for the respondents.

Mohd Arief JC:

[1] This is the appeal against the decision of the learned sessions court judge delivered on 27 August 2019. The appellant dissatisfied with the said decision filed an appeal to this court on 6 September 2019.

[2] Having read the record of appeal, submissions filed by parties and after hearing counsels on 24 May 2021, I decided to dismiss the appeal with costs. The following contains the grounds on which I decided to dismiss the appeal and why I believe there are no valid reasons for any form of judicial interference against the decision of the learned sessions court judge.

BASIC FACTS

[3] The appellant and the second respondent entered into an agreement to supply security services (without any firearm) at the schools or institute of education under the purview of the Ministry of Education within the State of Selangor, the first respondent.

[4] The material terms of the agreement are as follows:

(i) Clause 2.1

2. SKOP PERKHIDMATAN

2.1 Kontraktor hendaklah melaksanakan Perkhidmatan, mengikut arahan Kerajaan, dari masa ke semasa, sama ada secara lisan atau bertulis mengenai Perkhidmatan mulai Tarikh Berkuatkuasa yang dinyatakan dalam Klausa 3.1 atau pada apa-apa tarikh-tarikh lain yang dimaklumkan, secara lisan atau bertulis, oleh Kerajaan mengikut terma-terma dan syarat-syarat Perjanjian ini dan termasuk —

(a) melaksanakan Perkhidmatan mengikut Skop Perkhidmatan seperti yang dinyatakan dalam Lampiran B;

(b) melaksanakan Perkhidmatan dan keanggotaan pengawal, syif atau giliran dan mengikut tempoh kawalan seperti yang dinyatakan dalam Lampiran E;

(c) mematuhi undang-undang yang dilaksanakan oleh mana agensi Kerajaan yang berkenaan dengan Perkhidmatan;

(d) mematuhi Peraturan-peraturan Ejensi Persendirian 1970 [PU (A) 410/970] dan Peraturan-Peraturan Pengambilan Ejensi Persendirian 1981 [PU (A) 214/1981];

(e) diluluskan untuk menjalankan Perkhidmatan oleh Kementerian Dalam Negeri;

(f) mempunyai Polisi Insurans Perlindungan yang meliputi perlindungan untuk Kerajaan, harta benda yang dikawal dan pengawal;

(g) menganggotai Persatuan Perkhidmatan Kawalan Keselamatan Malaysia sebagai ahli yang sah berkuatkuasa sepanjang Tempoh Perjanjian;

(h) melaksanakan Perkhidmatan pada setiap hari sepanjang Tempoh Perjanjian termasuk Sabtu, Ahad, cuti umum dan cuti persekolahan;

(i) mempunyai lesen, permit atau kebenaran menjalankan Perkhidmatan yang sah dan berkuatkuasa yang dikeluarkan oleh Kementerian Dalam Negeri sebagaimana yang disertakan dalam Lampiran C; dan

(j) melaksanakan Perkhidmatan dengan mengupah, mengaji atau mengambil pengawal mengikut Skim Perkhidmatan pengawal seperti yang dinyatakan dalam Lampiran H;

(ii) Clause 5.5

5. PEMBAYARAN

5.5 Walau apa pun yang dinyatakan dalam Klausa ini, tanpa menjejaskan hak lain Kerajaan dalam Perjanjian ini, Kerajaan sentiasa berhak untuk membuat tolakan (set-off), meminda, mengurangkan, memotong dan mengubah pembayaran Nilai Perjanjian yang kena dibayar kepada Kontraktor sekiranya Perkhidmatan yang dilaksanakan oleh Kontraktor tidak mengikut mana-mana satu atau apa-apa gabungan perkara yang berikut:

(a) pelaksanaan Perkhidmatan atau mana-mana bahagiannya oleh Kontraktor didapati oleh Kerajaan tidak memuaskan atau tidak memenuhi Skop Perkhidmatan;

(b) pelanggaran mana-mana terma terma dan syarat-syarat dalam Perjanjian ini; atau

(c) pelanggaran apa-apa arahan Kerajaan yang diberikan dari semasa ke semasa sama ada secara lisan atau bertulis berkenaan dengan pelaksanaan Perkhidmatan.

(iii) Clause 12.1

12.0 HAK KERAJAAN APABILA PERKHIDMATAN YANG DILAKSANAKAN TIDAK MENGIKUT TERMA-TERMA DAN SYARAT-SYARAT

12.1 Jika Perkhidmatan yang dilaksanakan tidak mengikut atau jika berlaku pelanggaran mana-mana terma-terma dan syarat-syarat Perjanjian ini, Kerajaan boleh mengambil tindakan mana-mana satu atau apa-apa gabungan dari perkara-perkara berikut:

(a) menolak Perkhidmatan atau apa-apa bahagian darinya;

(b) menolak Perkhidmatan atau apa-apa bahagian darinya dan meminta Kontraktor menggantikan Perkhidmatan atau apa-apa bahagian darinya dalam apa-apa tempoh yang ditentukan oleh Kerajaan. Jika Perkhidmatan atau apa-apa bahagian darinya tidak digantikan dalam masa yang ditentukan, Kerajaan boleh mendapatkan Perkhidmatan atau apa-apa bahagian darinya daripada lain-lain punca dan Kontraktor dikehendaki membayar amaun yang kepada Kerajaan;

(c) menamatkan Perjanjian ini dan melantik pihak lain untuk melaksanakan Perkhidmatan;

(d) Mengambil atau merampas keseluruhan atau sebahagian jumlah wang dalam Bon Pelaksanaan.

(e) Mengenakan denda dengan jumlah dua puluh peratus (20%) daripada jumlah bulanan Nilai Perjanjian bagi premis terlibat bagi maksud ini, asas pengiraan denda adalah seperti berikut:

Denda = 20% x Jumlah bulanan nilai perjanjian bagi premis terlibat mengikut Lampiran G

(iv) Clause 12.2

12.2 Tanpa menjejaskan klausa 12.1, jika didapati mana-mana pekerja Kontraktor tidak hadir bertugas mengikut terma-terma dan syarat-syarat dalam Perjanjian ini, Kerajaan boleh mengenakan denda dengan jumlah yang sama banyak dengan gaji sejam setiap pekerja yang tidak hadir tersebut mengikut Lampiran G. bagi maksud ini, asas pengiraan kadar pemotongan bagi pengawal yang tidak bertugas adalah seperti berikut:

Pemotongan = KS x BH x BP

KS: Kadar sejam seorang pengawal BJ

BJ: Bilangan jam tidak bertugas

BP: Bilangan pengawal tidak bertugas

[5] Essentially, the appellant is unhappy with the decision of the first respondent that had retained and deducted the sums of RM281,000.92 from the contract sum.

[6] The said sums were allegedly deducted by the first respondent on the ground that the appellant had failed to comply with its contractual obligations and failed to provide the services that were directed by the first respondent.

[7] The first respondent had deducted the sums under cl 12.1(e) and 12.2 of the agreement. These clauses have been reproduced earlier.

[8] The first respondent alleges that the appellant had failed to undertake the directed services, which requires a deduction of the sums to be paid to the appellant. In support, the respondents relies on the documents appearing in Vol II to IV of the record of appeal. These are the records incorporating the invoices, data clocking and minutes of meetings of the second respondent concerning the performance of the appellant.

THE DECISION OF THE SESSIONS COURT JUDGE

[9] The learned sessions court judge delivered his grounds dated 13 January 2020. In dismissing the appellant's claim, the learned sessions court judge found as follows:

> [22] Mahkamah mendapati bahawa hampir keseluruhan fakta-fakta telah pun dipersetujui oleh kedua-dua pihak melainkan isu samada pihak defendan berhak untuk memotong sejumlah RM281,000.92 daripada jumlah kontrak yang dipersetujui iaitu sebanyak RM3,658,832 dan samada defendan terlebih dahulu perlu membuktikan kerugian dan kerosakan disebabkan oleh tindakan plaintif sepertimana keperluan undang-undang di bawah s 75 Akta Kontrak 1950.
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> [23] Mahkamah telah meneliti fakta kes yang dipersetujui dan keterangan-keterangan SP1, SD1, SD2, dan SD3 dan mendapati bahawa plaintif telah melakukan pecah kontrak apabila gagal membuat clocking dan memastikan pengawal keselamatan yang dilantik untuk hadir bertugas seperti mana yang telah ditetapkan di dalam klausa 2 perjanjian tersebut. Keterangan SD2 dan SD3 yang merupakan pegawai yang membuat semakan dokumen pada setiap bulan jelas membuktikan pelanggaran tersebut oleh pihak plaintif berdasarkan data penguncian watchmans clock bagi 10 buah sekolah sepanjang tempoh Januari 2015 sehingga Januari 2016.
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> [24] Seterusnya, mahkamah juga telah meneliti kandungan kontrak yang telah ditandatangani dan mendapati wujudnya klausa penalti di dalam perjanjian tersebut iaitu peruntukan klausa 12 perjanjian tersebut yang menyatakan Hak kerajaan apabila perkhidmatan yang dilaksanakan tidak mengikut terma-terma dan syarat antaranya adalah untuk mengenakan denda dengan jumlah 20 peratus daripada jumlah bulanan nilai perjanjian bagi premis terlibat.
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> [25] Dalam hal ini, mahkamah berpendapat peruntukkan s 75 Akta Kontrak 1950 adalah terpakai. Dalam memberi tafsiran pengaplikasian s 75 ini, mahkamah telah merujuk kepada dua leading case iaitu kes mahkamah Persekutuan *Selvam Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 dan juga kes terbaru

iaitu kes Mahkamah Persekutuan, *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15; [2019] 2 CLJ 723.

[26] Mahkamah telah meneliti peruntukan s 75 Akta Kontrak 1950 dan kedua-dua kes di atas dan mendapati bahawa prinsip undang-undang yang terkini berkaitan isu ini sepertimana yang digariskan oleh Mahkamah Persekutuan di dalam kes *Cubic Electronics Sdn Bhd v Mars Telecommunications Sdn Bhd* adalah seperti berikut:

(i) Beban awal (*initial onus*) adalah terletak pada pihak-pihak yang ingin melaksanakan klausa penalti tersebut untuk membuktikan bahawa:

(a) telah berlaku pelanggaran kontrak

(b) Kontrak tersebut mengandungi klausa penalti jumlah yang perlu dibayar akibat pelanggaran kontrak.

(ii) Setelah dua elemen tersebut dibuktikan, pihak yang tidak bersalah berhak untuk menerima gantirugi tidak melebihi jumlah yang ditetapkan didalam kontrak tidak kira samada kerugian sebenar dibuktikan atau tidak melainkan pihak yang melanggar kontrak membuktikan bahawa jumlah tersebut adalah tidak munasabah.

(iii) Sekiranya ada pertikaian mengenai apa yang dikatakan 'gantirugi yang munasabah', beban pembuktian adalah terletak pada pihak yang melanggar kontrak untuk menunjukkan klausa penalti tersebut adalah tidak munasabah.

[27] Oleh yang demikian, merujuk kepada kes di hadapan mahkamah pada hari ini, mahkamah mendapati bahawa kedua-dua elemen pertama iaitu telah berlakunya pecah kontrak oleh plaintif dan wujudnya klausa penalti yang telah ditetapkan jumlahnya di dalam perjanjian iaitu sepertimana kiraan dan formula yang dinyatakan didalam klausa 12 perjanjian tersebut telah berjaya dibuktikan oleh pihak defendan melalui keterangan dan ekshibit yang dikemukakan oleh SD1, SD2 dan SD3.

[28] Seterusnya, adalah menjadi beban kepada pihak plaintif untuk membuktikan bahawa potongan yang dibuat oleh defendan adalah tidak munasabah dan di dalam kes ini, mahkamah mendapati bahawa pihak defendan telah gagal untuk membangkitkan atau memplid di dalam pliding dan sepanjang perbicaraan isu bahawa kadar denda yang dikenakan ke atas defendan adalah tidak munasabah melainkan isu potongan yang melebihi 20 peratus pada bulan-bulan tertentu yang mana ianya telah dijelaskan oleh SD2 dan SD3 bahawa ianya adalah kiraan bawaan kedepan untuk potongan pada bulan sebelumnya.

[29] Mahkamah juga mendapati bahawa jumlah pemotongan 20 peratus daripada bayaran bulanan tersebut yang berjumlah RM281,000.92 adalah munasabah dan tidak melampau berdasarkan nilai keseluruhan perjanjian tersebut yang berjumlah RM3,656,832 dan ianya juga tidak melebihi daripada jumlah yang telah ditetapkan di dalam perjanjian tersebut.

[30] Akhirnya, mahkamah berpendapat bahawa defendan-defendan berhak untuk membuat potongan tersebut berdasarkan klausa 12 perjanjian tersebut.

PRINCIPLES FOR APPELLATE INTERVENTION

[10] As I am hearing an appeal against the decision of the sessions court judge after a full trial, I am mindful of my jurisdiction and the limitations of any appellate interference on the findings made by a trial judge. I refer to the decision of Nallini Pathmanathan FCJ in *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors* [2021] 3 MLJ 622; [2021] 4 CLJ 821:

> [34] The appellants, notwithstanding the legal questions put forward at the leave stage, have sought in their submissions to try and have the findings of fact made at the trial stage revisited, but there is clearly no basis for this court to do so. Firstly, the findings of fact made at the trial stage have been made only after a thorough examination and analysis of the evidence on record. It cannot be said that the trial judge was 'plainly wrong'. This phrase was defined by Lord Reed in the English Supreme Court case of *Henderson v Foxworth Investments Limited and Another* [2014] UKSC 41 *to mean 'one that no reasonable judge could have reached'*. The cases discussing principles of appellate intervention have been set out at length in *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428; [2016] 4 CLJ 665 ('MMC Oil & Gas') (paras 5–19). We do not propose to repeat the same here, save to point out the passage from the UK Supreme Court in *Carlyle v Royal Bank of Scotland Plc* [2015] UKSC 13 cited in para 9 of *MMC Oil & Gas* (above) which disapproved of re-opening all questions of fact for redetermination on appeal having regard to the advantage and role which the first instance judge has in determining the facts (see also *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309). In any event, it would be improper and erroneous in law for the appellants to seek to invalidate, annul or undo those well-predicated findings of fact at this appellate stage.

[11] I also refer to the decision of the Court of Appeal in *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428; [2016] 4 CLJ 665 where Nallini Pathmanathan JCA (as Her Ladyship then was) stated:

> Intervention by the Court of Appeal
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> [5] As this matter comes before this court on appeal after a full trial, this court is bound to have regard to the limited power of an appellate court to reverse findings of fact of the judge who has heard the evidence. *It is a long settled principle, stated and restated both domestically and in wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.* The famous speech of Lord Thankerton in *Thomas v Thomas* [1947] AC 484 is arguably the most frequently cited judicial dicta on this point:
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> > (1) Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, *an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial*

judge's conclusion. (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses and the matter will then become at large for the appellate court.

[6] Similarly, the speeches of Lord Shaw of Dunfermline in *Clarke v Edinburgh and District Tramways Co Ltd* [1919] SC (HL) 35, 36-37 where he said that *an appellate court should only intervene where it is satisfied that the trial judge was 'plainly wrong', and the dictum of Lord Greene MR in Yuill v. Yuill[1945] P 15 (at p. 19) are equally familiar. These dicta all point to the fact that it should only be on the rarest of occasions and where the appellate court is convinced by the plainest of considerations that it would be justified in finding that the trial judge had come to an erroneous conclusion on the evidence before him*.

[12] Therefore, for the appellant to be successful it must be shown to this court that the decision of the learned sessions court was plainly wrong and that no reasonable judge could have come to the same conclusion having regard all relevant facts, documents, and the applicable law. I am mindful of the above judgments of the superior courts when treading on the subject matter of the appeal before me.

APPEAL AGAINST THE LEARNED SESSIONS COURT JUDGE DECISION

[13] The appellant's memorandum of appeal are summarised as follows:

(a) grounds 1, 2, 10 — the honourable session court judge erred in law and fact in dismissing the appellant's claim for the payment of RM281,000.92 as the respondents do not have the right to unilaterally deduct the said sums from the contract sum of RM3,658, 832;

(b) grounds 3, 4 — the honourable sessions court judge erred in not granting interest at 5%pa on the amount not paid from the date of delay in settling the sums to the date of full realisation;

(c) grounds 4, 7, 8 and 9 — the honourable session court judge erred in failing to hold that the respondents are entitled to deduct the sum of RM281,000.92 without proving damages and these were unreasonable and there was admission as the respondents did not amend its defence;

(d) grounds 5 and 6 — the honourable sessions court judge erred in holding that the decision of the Federal Court in *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15; [2019] 2 CLJ 723 applies to this case; and

(e) ground 7 — the honourable sessions court judge erred by failing to hold that the respondents failed to prove their case as the documents were not marked as exhibits and only remained as ID documents.

[14] I will deal with these issues raised by the appellant in the following paragraphs.

SUBSTANTIVE REASONING FOR DISMISSING THE APPEAL

Whether the respondents has shown that the appellant did commit breaches of the agreement justifying the deduction under cl 12.1 and 12.2 — Grounds 1, 2, 3, 4, 7, 8, 9, and 10

[15] As produced earlier, the learned sessions court judge had found that the appellant had committed breaches of the agreement justifying the deduction. The learned sessions court judge stated:

> Mahkamah telah meneliti fakta kes yang dipersetujui dan keterangan-keterangan SP1, SD1, SD2 dan SD3 dan mendapati bahawa plaintif telah melakukan pecah kontrak apabila gagal membuat clocking dan memastikan pengawal keselamatan yang dilantik untuk hadir bertugas sepertimana yang telah ditetapkan di dalam klausa 2 perjanjian tersebut. Keterangan SD2 dan SD3 yang merupakan pegawai yang membuat semakan dokumen pada setiap bulan jelas membuktikan pelanggaran tersebut oleh pihak plaintif berdasarkan data penguncian watchmans clock bagi sepuluh buah sekolah sepanjang tempoh Januari 2015 sehingga Januari 2016.

[16] Having reviewed the submissions, the documents, and the notes of evidence, I do not believe that the learned sessions court judge had committed any form of error that justifies appellate intervention on the issues posed by the appellant as identified above.

[17] On the evidence presented by SD2 and SD3, the witnesses had stated in their evidence in chief that the appellant did commit breaches of the agreement and failed to provide services to the satisfaction of the respondents. The following evidence shows that the SD2 and SD3 had reviewed the services rendered by the appellant and found breaches committed to failing to clock in at the appropriate time, the failure to provide the required uniforms and even non-attendance or late attendance by the guards:

> SD2
>
> S5: Siapakah yang menyemak berkaitan pembayaran di bawah Perjanjian Perkhidmatan Kawalan Keselamatan bagi Sekolah/ Institusi Pendidikan di Bawah Jabatan Pelajaran Selangor Bagi Daerah Gombak Zon 7 ('Perjanjian Tersebut')?
>
> J5: Saya adalah pembantu tadbir yang bertugas untuk menyemak dokumen yang

dikemukakan oleh Plaintif di antara tempoh April 2014 hingga Mei 2015 dan menyediakan baucer bayaran bagi pembayaran di bawah Perjanjian tersebut.

S9: Berdasarkan kepada keterangan puan di soalan 5 di atas, adakah puan yang mencadangkan supaya denda/pemotongan dibuat?

J9: Setelah semakan dibuat kepada dokumen yang dikemukakan oleh pihak Plaintif terutamanya data clocking, saya mendapati pihak Plaintif telah gagal melakukan clocking dengan secukupnya berdasarkan bilangan tempat check point semasa rondaan. Perkara ini dalam dilihat di m/s 4-506 Ikatan Dokumen Defendan Jld I & II.

Berdasarkan kepada penemuan tersebut saya akan mencadangkan kepada pegawai yang menyelia saya iaitu Encik Anizam bin Ahmad supaya pihak Plaintif dikenakan denda kerana melanggar terma-terma dan syarat-syarat Perjanjian tersebut.

S10: Semasa puan menyemak dokumen yang dikemukakan dan mencadangkan denda dan pemotongan, adakah puan telah merujuk kepada mana-mana klausa kepada Perjanjian tersebut?

J10: Saya telah merujuk kepada klausa Perjanjian tersebut semasa menyemak dokumen yang dikemukakan. Perkara mengenai denda ada dinyatakan dalam klausa 12.1 (e) kepada Perjanjian tersebut dimana denda sebanyak 20% daripada jumlah nilai perjanjian bagi premis terlibat boleh dikenakan terhadap Plaintif sekiranya Plaintif tidak mengikut atau melanggar mana-mana terma dan syarat Perjanjian ini sebagaimana di m/s 14 Ikatan Dokumen Bersama.

Selain daripada itu, Plaintif juga boleh dikenakan denda di bawah klausa 12.2 Perjanjian tersebut sekiranya pekerja/pengawal keselamatan yang dilantik Plaintif gagal untuk hadir bertugas sebagaimana yang dinyatakan di m/s 14-15 Ikatan Dokumen Bersama.

Pemotongan pembayaran (set off) boleh dibuat berdasarkan kepada klausa 5.6 di m/s 8 Ikatan Dokumen Bersama.

S11: Bagaimanakan kaedah tolakan bayaran yang telah dibuat bagi bulan Januari 2015 sehingga Mei 2015?

J11: Tolakan bayaran yang dibuat bagi bulan Januari 2015 hingga Mei 2015 adalah sebagaimana yang berikut:

Bagi bulan Januari 2015, berdasarkan kepada baucar bayaran, tiada potongan dibuat dan jumlah keseluruhan yang dibayar adalah sebanyak RM111,192.28 (m/s 4 selepas m/s 142 RR Bhg C Jilid I) (Penyelarasan dan tolakan dibuat semasa pembayaran bagi bulan Mac 2015)	Walau bagaimanapun, penyelarasan semula bayaran Perkhidmatan bagi bulan Mac 2015 selepas semakan semula data clocking dan denda sebanyak 20% daripada jumlah nilai perjanjian bagi premis yang terlibat dikenakan terhadap Perayu kerana telah melanggar terma dan syarat Perjanjian yang disebabkan tidak 24 membuat clocking mencukupi pada bulan Januari 2015. (Rujuk m/s 4 hingga 52 RR Bhg. C Jilid I).

Bagi bulan Februari 2015, berdasarkan kepada baucer bayaran, tiada potongan dibuat dan jumlah keseluruhan yang dibayar adalah sebanyak RM111,192.28. (m/s 53 RR Bhg. C Jilid I) (Penyelarasan dan tolakan dibuat semasa pembayaran bagi bulan Mac 2015)	Walau bagaimanapun, penyelarasan bayaran Perkhidmatan bagi bulan April 2015 telah dibuat dan selepas semakan semula dan denda sejumlah 20% daripada jumlah nilai perjanjian bagi premis yang terlibat dikenakan terhadap Perayu apabila didapati melanggar terma dan syarat Perjanjian kerana tidak membuat clocking mencukupi pada bulan Februari 2015. (Rujuk m/s 53-94 (selepas m/s 142) RR bhg. C Jld I)
Bagi bulan Mac 2015, berdasarkan kepada baucer bayaran, jumlah yang telah dibayar adalah sebanyak RM67,153.60 (m/s 95 RR Bhg. C Jld I))	Berdasarkan semakan data clocking di m/s 97 (selepas m/s 142) RR Bhg. C Jld I hingga m/s 144 RR Bhg. C Jld II, didapati bahawa Perayu juga telah melanggar terma dan syarat Perjanjian tersebut kerana tidak membuat clocking yang 25 mencukupi yang mencukupi pada bulan Mac 2015. Maka Perayu dikeanakan denda sebanyak 20% daripada jumlah nilai perjanjian bagi premis yang terlibat. Walaubagaimanapun, jumlah potongan denda yang dibuat pada bulan Januari 2015 yang sebanyak 20% daripada jumlah nilai perjanjian bagi premis yang terlibat. Bayaran bagi bulan Januari 2015 telah dibayar penuh oleh pihak Responden kepada pihak Perayu, maka potongan denda bagi bulan Januari 2015 dibuat melalui bayaran pada bulan Mac 2015. (Rujuk m/s 5,6,95/s (selepas m/s 142) RR bhg. C Jilid I hingga 144 RR Bhg C Jilid II)
Bagi bulan April 2015, berdasarkan kepada baucer bayaran, bayaran yang telah dibuat adalah sebanyak RM67,153.60 (m/s 145 RR Bhg C Jilid II).	Berdasarkan semakan data clocking di m/s 145-197 RR Bhg. C Jilid II, didapati Perayu telah melanggar terma dan syarat Perjanjian tersebut kerana tidak membuat clocking yang 26 mencukupi pada bulan April 2015. Maka Perayu dikenakan denda sebanyak 20% daripada jumlah nilai perjanjian bagi premis yang terlibat. Walau bagaimanapun, jumlah potongan denda yang dibuat pada bulan April 2015 adalah termasuk potongan denda yang dibuat pada bulan April 2015

	adalah termasuk potongan bagi bulan Februari 2015 yang sebanyak 20% daripada jumlah nilai perjanjian bagi premis yang terlibat kerana pihak Perayu juga telah melanggar terma dan syarat Perjanjian tersebut. Bayaran bagi bulan Februari 2015 telah dibayar penuh oleh pihak Repsonden kepada pihak Perayu, maka potongan denda bagi bulan Februari 2015 dibuat melalui bayaran bulan April 2015 (Rujuk m/s 53, (selepas M/s 142) RR Bhg C Jilid I dan 145 hingga 197 RR Bhg. C Jilid II)
Bagi bulan Mei 2015, berdasarkan kepada baucer bayaran, potongan sebanyak 20% telah dibuat dan jumlah keseluruhan yang dibayar adalah sebanyak RM89,538.20 (m/s(selepas m/s 275 RR Bhg. C Jilid IV)	Berdasarkan semakan data clocking di m/s 3-31 (selepas m/s 275 RR Bhg. C Jilid IV, didapati bahawa Perayu juga telah melanggar terma dan syarat Perjanjian kerana tidak membuat clocking yang mencukupi pada bulan Jun 2015. Maka Perayu dikenakan denda sebanyak 20%. (Rujuk m/s 3 hingga 31 (selepas m/s 275) RR Bhg. C Jilid IV.

SD3:

S3: Apakah skop tugas Tuan?

S3: Skop tugas adalah untuk menyemak dokumen berkaitan bayaran bagi kontrak perkhidmatan kawalan keselamatan di bawah PPD Gombak.

S4: Siapakah yang menyemak dokumen berkaitan pembayaran di bawah Perjanjian Perkhidmatan Kawalan Keselamatan Bagi Sekolah/Institusi Pendidikan di Bawah Jabatan Pelajaran Selangor Bagi Daerah Gombak Zon 7 ('Perjanjian Tersebut') antara tempoh Januari 2015 hingga Januari 2016?

J4: Saya adalah pembantu tadbir yang bertugas untuk menyemak dokumen berkaitan pembayaran di bawah Perjanjian tersebut tetapi saya hanya menyemak dokumen bagi tempoh Jun 2015 hingga Januari 2016 sahaja. Dokumen pembayaran bagi tempoh Januari 2015 hingga Mei 2015 adalah disemak oleh Puan Aini binti Ibrahim.

S7: Berdasarkan kepada keterangan tuan di soalan 4 di atas, adakah Tuan telah mencadangkan supaya denda/ pemotongan dibuat?

J7: Saya telah mencadangkan denda atau pemotongan dibuat setelah semakan dibuat kepada dokumen yang dikemukakan oleh pihak Plaintif terutamanya data clocking. Saya mendapati pihak Plaintif telah gagal melakukan clocking mengikut bilangan check point semasa rondaan. rujuk m/s 4-506 Ikatan Dokumen Defendan Jld I & II.

S8: Semasa Tuan menyemak dokumen yang dikemukakkan dan mencadangkan

denda/pemotongan, adakah Tuan telah merujuk kepada mana-mana klausa kepada Perjanjian tersebut?

J8: Saya telah merujuk kepada klausa Perjanjian tersebut semasa menyemak dokumen yang dikemukakan.

Perkara mengenai denda ada dinyatakan dalam klausa

12.1(e) kepada Perjanjian tersebut dimana denda sebanyak 20% daripada jumlah nilai perjanjian bagi premis terlibat boleh dikenakan terhadap Plaintif sekiranya Plaintif tidak mengikut atau melanggar mana-mana terma dan syarat Perjanjian ini sebagaimana di m/s 14 Ikatan Dokumen Bersama.

Selain daripada itu, Plaintif juga boleh dikenakan denda di bawah klausa 12.2 Perjanjian tersebut sekiranya pekerja/pengawal keselamatan yang dilantik Plaintif gagal untuk hadir bertugas sebagaimana yang dinyatakan di m/s 14-15 Ikatan Dokumen Bersama. Pemotongan pembayaran (set off) boleh dibuat berdasarkan kepada klausa 5.6 di m/s 8 Ikatan Dokumen Bersama.

S9 Bagaimanakan kaedah tolakan bayaran yang telah dibuat bagi bulan Jun 2015 sehingga Januari 2016?

J9: Tolakan bayaran yang dibuat bagi bulan Jun 2015 hingga Januari 2016 adalah sebagaimana yang berikut:

Bagi bulan Jun 2015, berdasarkan kepada jumlah yang dinyatakan pada baucer bayaran, potongan sebanyak 20% dibuat dan jumlah keseluruhan yang dibayar adalah RM89,538.20. (m/s 32 Ikatan Dokumen Tambahan Defendan (No.2)).	Berdasarkan semakan dokumen di m/s 36–38 Ikatan Dokumen Tambahan Defendan No. 2 didapati bahawa Plaintif juga telah melanggar terma dan syarat Perjanjian kerana tidak membuat clocking yang mencukupi berdasarkan data clocking Jun 2015. Maka Plaintif dikenakan denda sebanyak 20%.
Bagi bulan Julai 2015, berdasarkan kepada jumlah yang dinyatakan pada baucer bayaran, potongan sebanyak 20% dibuat dan jumlah keseluruhan yang dibayar adalah RM89,538.20 (m/s 198 Ikatan Dokumen Defendan Jld 1).	Berdasarkan semakan dokumen di m/s 200–231, Ikatan Dokumen Defendan Jld 1, didapati bahawa Plaintif juga telah melanggar terma dan syarat Perjanjian kerana tidak membuat clocking yang mencukupi berdasarkan data clocking bulan Julai 2015. Maka Plaintif dikenakan denda sebanyak 20%.
Bagi bulan Ogos 2015, berdasarkan kepada baucer bayaran, jumlah yang telah dibayar adalah sebanyak RM89,537.80 (m/s 232 Ikatan Dokumen Defendan Jld 1))	Berdasarkan semakan data clocking di ms 234–270 RR Bhg. C Jilid I, didapati bahawa Plainitf juga telah melanggar terma dan syarat Perjanjian kerana tidak membuat cloking yang mencukupi berdasarkan pada bulan Ogos 2015. Maka Plaintif dikenakan denda sebanyak 20%.

Bagi bulan September 2015, berdasarkan kepada baucer bayaran, jumlah keseluruhan yang dibayar adalah RM89,446.06 (m/s 271 Ikatan Dokumen Defendan Jld 1).	Berdasarkan semakan dokumen di m/s 273–321, Ikatan Dokumen Defendan Jld I, didapati bahawa Plaintif juga telah melanggar terma dan syarat Perjanjian kerana tidak membuat clocking yang mencukupi berdasarkan data clocking bulan September 2015. Maka Plaintif dikenakan denda sebanyak 20% daripada nilai keseluruhan perjanjian pada bulan tersebut kerana denda yang dikenakan adalah melibatkan kesemua 10 buah sekolah. Selain itu, Plaintif juga dikenakan potongan gaji untuk tempoh 12 jam bagi 1 pengawal kerana gagal hadir bertugas untuk 1 shif bagi SK Taman Ehsan (m/s 299 Ikatan Dokumen Defendan Jld I).
Bagi bulan Oktober 2015, berdasarkan kepada jumlah yang dinyatakan pada baucer bayaran, potongan sebanyak 16% telah dibuat dan jumlah keseluruhan yang dibayar adalah RM94,015.12 (m/s 322 Ikatan Dokumen Defendan Jld I).	Berdasarkan semakan dokumen I m/s 324–353 Ikatan Dokumen Defendan Jld 1, didapati bahawa Plaintif juga telah melanggar terma dan syarat Perjanjian kerana tidak membuat clocking yang mencukupi berdasarkan data clocking bulan Oktober 2015 (bagi 8 buah sekolah). Maka Plaintif dikenakan denda sebanyak 16% dari nilai keseluruhan. (denda adalah 20% untuk jumlah bulanan nilai Perjanjian bagi setiap premis (1 sekolah)).
Bagi bulan November 2015, berdasarkan kepada jumlah yang dinyatakan pada baucer bayaran, potongan sebanyak 20% telah dibuat dan jumlah keseluruhan yang dibayar adalah RM89,538.20 (m/s 354 Ikatan Dokumen Defendan Jld II).	Berdasarkan semakan dokumen di m/s 356–385 Ikatan Dokumen Defendan Jld II, didapati bahawa Plaintif juga telah melanggar terma dan syarat Perjanjian kerana tidak membuat clocking yang mencukupi berdasarkan data clocking bulan November 2015. Maka Plaintif dikenakan denda sebanyak 20%.

Bagi bulan Disember 2015, berdasarkan kepada jumlah yang dinyatakan pada baucer bayaran, potongan sebanyak RM825.66 telah dibuat dan jumlah keseluruhan yang dibayar adalah RM111,097.14 (m/s 386 &387 Ikatan Dokumen Jld II.	Berdasarkan semakan dokumen di m/s 388–421 Ikatan Dokumen Defendan Jld II, didapati bahawa Plaintif juga telah melanggar terma dan syarat Perjanjian kerana tidak membuat clocking yang mencukupi berdasarkan data clocking bulan Disember 2015 tetapi potongan denda bulan Disember 2015 hanya dibuat pada Januari 2016. Manakala potongan bayaran bagi bulan Disember yang dibuat sebanyak RM825.66 adalah bagi potongan gaji atas kegagalan pengawal hadir bertugas untuk 9 hari pada bulan Mei 2015 yang tidak dibuat semasa bayaran bulan Mei 2015.
Bagi bulan Januari 2016, berdasarkan kepada jumlah yang dinyatakan pada baucer bayaran, potongan sebanyak 18% daripada nilai keseluruhan Perjanjian pada bulan tersebut telah dibuat tetapi jumlah keseluruhan yang dibayar adalah RM73,593.76. (m/s 422 & 423 Ikatan Dokumen Defendan Jld II)	Bayaran bagi bulan Januari 2016 adalah merupakan bayaran selepas penyelarasan: (a) November 2015 (pemulangan denda 20% daripada jumlah bulanan Nilai Perjanjian bagi setiap premis (SK Bukit Rawang Jaya)-RM2238.46); (b) Potongan denda ketidakhadiran pengawal bagi tempoh 1 shif (12 jam) bagi bulan November 2015; (c) Denda Disember 2015 sebanyak 18% daripada jumlah bulanan Nilai Perjanjian (9 buah sekolah); (d) Potongan denda ketidakhadiran pengawal bagi tempoh 2 shif (24 jam) bagi bulan Disember 2015; dan (e) Denda bulan Januari 2016 sebanyak 18% daripada jumlah bulanan Nilai Perjanjian (m/s 423 Ikatan Dokumen Defendan Jld 2). Berdasarkan semakan dokumen di m/s 428–456 Ikatan Dokumen Defendan Jld II, didapati bahawa Plaintif juga telah melanggar terma dan syarat Perjanjian kerana tidak membuat clocking yang mencukupi berdasarkan data clocking bulan Januari 2016. Maka Plaintif dikenakan denda sebanyak 18%.

S10: Bagaimanakah penetapan bilangan check point dan berapakah kekerapan membuat clocking perlu dilakukan?

J10: Bilangan check point adalah berdasarkan laporan status peralatan yang dibekalkan oleh Plaintif yang telah disahkan oleh pihak sekolah. Manakala arahan berkenaan kekerapan melakukan rondaan dan membuat clocking adalah berdasarkan surat bertarikh 18.2.2013 yang ditandatangani oleh Ketua Setiausaha Kementerian di m/s 1–3 Ikatan Dokumen Defendan Jld I. Jadual kekerapan ada dilampirkan bersama dan dan perkara ini telah dimaklumkan kepada mana kontraktor yang dilantik untuk melaksanakan perkhidmatan kawalan keselamatan di institusi/sekolah di bawah Kementerian Pelajaran Malaysia.

[18] The evidence by SD2 and SD3 were subject to strenuous cross-examination by the appellant's counsel, and I found that these witnesses withstood them and maintained the evidence provided in examination in chief. An example of the evidence of SD2 and SD3 can be seen as follows:

SD2

MGM: Itu Aini buat assumption. Itulah saya cakap tadi, sebelum Aini buat potongan, mesti berhubung dengan pihak-pihak sekolah atau Plaintif, tanya keterangan dia. That is natural justice. Lepas itu potong. Itulah saya cakap, apa yang Aini buat tidak munasabah.

AINI: Itu bukan tanggungjawab saya kena telefon satu-satu sekolah kenapa tak, nak tanya semua masalah tu. Itu tanggungjawab penyelia Plaintif. Plaintif dibekalkan dengan satu penyelia. Dia kena memantau setiap sekolah. Bila dia collect satu dokumen ini, makanya dia dah baca, dia dah pastikan dokumen ini lengkap. Baru diserahkan ke pihak PPD untuk dibuat semakan kali kedua dan buat bayaran.

MGM: See Aini, Aini tengok clock-in sheet, ada lewat satu jam. Aini tulis, bukan, satu jam dua jam lewat?

AINI: Tapi saya tak potong sebab tu.

MGM: Ada. Kadang-kadang clock-in.

AINI: Tidak clock-in ya. Saya akan potong.

MGM: Kadang-kadang lewat pun potong juga.

AINI: Saya akan cadangkan pemotongan bila berlakunya tidak clock-in pada tempat-tempat tertentu.

MGM: Ya, Aini buat potongan sebab tidak clock-in. Tapi Aini tidak beri peluang untuk Plaintif beri keterangan. Itulah kes Plaintif. Dia ada alasan yang munasabah.

AINI: Tapi terlalu banyak. Dari sepanang tahun.

SD3

MGM: Siapa yang memberi cadangan untuk tidak patuh clocking?

HAIRMAN: Ini dari segi semakan —

MGM: 388.

HAIRMAN: Ya semakan sayalah, dari segi —

MGM: Walaupun dokumen tak lengkap, witness beri cadangan untuk potong 20%. Betul?

HAKIM: Jawapan? Tengok muka surat 388.

HAIRMAN: Ya.

HAKIM: Ok

MGM: Dicadangkan.

HAIRMAN: Ya, semakan saya, ya.

MGM: Dan akhirnya, kena potong juga 20%. Betul?

HAIRMAN: Ya, betul.

[19] The appellant's sole witness under cross-examination admitted that there was evidence that the appellant did fail to comply with the terms of the agreement. Evidence was extracted from the appellant's witness showing that the guards provided did fail to clock their time as required by the respondents, there were instances of non-attendance, failure by the appellant to provide uniform and even a break-in at one of the schools supposedly guarded by the appellant's employees. The following are examples of the same:

SP1

SAM: Ok. What does this mark mean Dato'? The three-right tick on the right side. On the last column. What does it mean Dato'?

VINU: Looking at it, it states that we didn't bekal seluar, topi, kasut to the guards.

...

SAM: But based on this information, do you agree that if I put to you that this information is telling us that Plaintif have not provide the guard with the seluar, topi, berry and kasut.

VINU: I don't agree.

SAM: You don't agree?

VINU: Because we have provided.

...

VINU: It is stated that the Guru Besar has tick saying that we did not provide the seluar, topi and kasut to the guards.

SAM: Ok thank you Dato'.

VINU: The Guru Besar stated that.

SAM: Yes I know.

VINU: Thank you.

SAM: The Guru besar stated. Yes, yes I know. I know because the pengesahan is only

A can be done by the Guru Besar right. Ok thank you Dato.

[20] Therefore, it could not be said unequivocally that the learned sessions court judge decision was perverse that no reasonable judge could have come to the same conclusion. I am reminded that this court's appellate powers are restricted based on the principles referred to earlier. In this case, the learned sessions court judge had seen the witnesses and chosen to believe the evidence of SD2 and SD3 and accepted their evidence as being credible instead of the appellant's witness. The assessment of such evidence is best left at the hands of the judges of the court of first instance unless circumstances appear otherwise based on the above-mentioned principles of law. I do not find any such circumstance based on the evidence as disclosed in the record of appeal.

[21] The appellant also contends that the learned sessions court judge had erred in considering the evidence tendered by the respondents concerning the alleged breaches by the appellant that were only marked as ID evidence and not part of the accepted exhibits at trial. These are, inter alia, the timesheet or clock records prepared by the appellant submitted to the schools and eventually were reviewed by SD2 and SD3. These documents were objected to by the appellant at trial on the ground that the maker of the documents should be called. At trial counsel for the appellant insisted that the headmasters of these schools be called.

[22] I agree that the learned sessions court judge had erred in not marking these documents into evidence as exhibits for the trial. Despite the objections raised by the appellant before the learned sessions court judge and repeated before this court, i opine that these documents should have been tendered into evidence as exhibits.

[23] I am of the opinion that these documents are relevant. They concern about the alleged breaches pleaded by the respondents. The documents were initially prepared by the appellant and were inspected and processed by SD2 and SD3. SD2 and SD3, as officers of the second respondent, inspected these documents and decided to make deductions against the appellant due to the failure by the appellant to comply with their contractual obligations.

[24] In other words, the persons who had inspected and marked these documents, ie, SD2 and SD3, were called to give evidence. SD2 and SD3 were the officers that made the finding and marked the documents to deny the said deductions. They were part and parcel of the whole payment process and would have been able to authenticate the validity of the documents, confirmed and explain the reason why these deductions were made.

[25] I refer to s 73A of the Evidence Act 1950 which provides as follows:

(1) Notwithstanding anything contained in this Chapter, *in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied*:

(a) *if the maker of the statement either —*

(i) *had personal knowledge of the matters dealt with by the statement; or*

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and

(b) *if the maker of the statement is called as a witness in the proceedings:*

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence —

(a) notwithstanding that the maker of the statement is available but is not called as a witness; and

(b) notwithstanding that the original document is not produced, if, in lieu thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document, or the material part thereof, was written, made or produced by him with his own hand, or was signed or initialled by him, or otherwise recognised by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of subsections (1) to (4), the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and, where the proceedings are with assessors, the court may in

its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason, it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

(6) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

(7) For the purpose of any rule of law or practice requiring evidence to be corroborated, or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by this Act shall not be treated as corroboration of evidence given by the maker of the statement.

[26] The evidence of the knowledge of SD2 and SD3 as well as their involvement in the process, which would have included the inspection and marking of the documents, examples extracted from the notes are as follows:

SD2

SAM: Ok, muka surat 4 baucar bayaran, ini dokumen yang disediakan oleh Puan?

AINI: Ya benar.

SAM: Ok. Untuk muka surat 5, 6 Puan sediakan ke dokumen ini?

AINI: Ya.

SAM: Ya. Ok bermula pada muka surat 7 sehingga muka surat 52-

HAKIM: Nanti sekejap, 4, 5, 6 dulu?

SAM: 4, 5, 6?

HAKIM: 4, 5, 6 Perayu?

MGM: Tidak ada bantahan, Yang Arif.

HAKIM: Ok, tak perlu ditanda.

SAM: Muka surat 7 hingga 52. Adakah ini dokumen yang Puan terima daripada Perayu untuk tujuan semakan bagi pembayaran Puan?

AINI: Ya.

...

SAM: Ok. Soalan saya, untuk dokumen di muka surat 7 hingga muka surat 52 ini, adakah ini dokumen yang dikemukakan oleh Perayu untuk tujuan tuntutan pembayaran bagi bulan Januari?

AINI: Ya.

SAM: Kemudian untuk muka surat 53 hingga muka surat 54, dokumen yang sama.

Adakah dokumen ini disediakan oleh pihak Puan? **A**

AINI: Ya.

...

SAM: Ok Dokumen di muka surat 55 hingga 94, ok. Puan, adakah ini dokumen yang dikemukakan oleh Pihak Perayu bagi tujuan bayaran bagi bulan Februari? **B**

AINI: Ya.

SAM: Adakah Puan yang menyemak dokumen ini?

AINI: Ya. **C**

SAM: Ok.

HAKIM: 55-90?

SAM: 94.

HAKIM: Ini kita tanda dulu, 55 hingga 94 ditanda sebagai for now ya, IDD2. **D**

SAM: Puan, adakah catatan yang dibuat pada muka surat 55 berkenaan tidak patuh clocking dibuat oleh pihak Puan?

AINI Boleh ulang soalan?

SAM: Dokumen 55 catatan yang bertanda asterisk, tidak patuh clocking. Adakah itu catatan yang dibuat oleh pihak Puan atau pun oleh pihak lain? **E**

AINI: Ya, itu catatan saya.

SAM: Ya. Ok. Antara muka surat 56 hingga 94 ini, tandaan-tandaan yang dibuat kepada data clocking atau pun rekod clocking yang ada tanda right, ada tanda bulat bernombor dan sebagainya, adakah catatan ini dibuat oleh pihak Puan? **F**

AINI: Ya.

The review of the timesheets ie, the 'penguncian watchman's clock' was done by SD2 and SD3. Therefore, the fact that the headmasters were not called does not preclude the admissibility of this evidence under s 73A of the Evidence Act 1950. **G**

[27] As stated earlier, I note that the learned judge did not exercise his powers under to mark these documents as part of the exhibits. However, I am guided by the powers provided to this court in its appellate jurisdiction as provided under s 29 of the Courts of Judicature Act 1964 to be read together with s 69 of the same Act. **H**

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[28] I refer to the decision of the Court of Appeal in *YB Dato' Hj Husam bin Hj Musa v Mohd Faisal bin Rohban Ahmad* [2015] 3 MLJ 364; [2015] 1 CLJ 787, where Hamid Sultan Abu Backer JCA, delivering the judgment of the Court of Appeal stated:

The only court which in civil case can consider the evidence or accept a document as an exhibit in a limited sense is the Appellate Court under s 167 of the EA 1950 or if it is Court of Appeal also pursuant to s 69 Courts of Judicature Act 1964 which reads as follows:

> 167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

And s 69 of the Courts of Judicature Act ('CJA')1964:

> 69(1) Appeals to the Court of Appeal shall be by way of rehearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.
>
> (2) The further evidence may be given without leave on interlocutory applications, or in any case as to matter which have occurred after the date of the decision from which the appeal is brought.
>
> (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.
>
> (4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.
>
> (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties although the respondents or parties have not appealed from or complained of the decision.

[13] *It is also a must in the event the exhibit is marked as ID only or if the evidence is by way of statement or oral evidence, it must form part of the appeal record as of right as s 167 of the EA 1950 as well as s 69 of the CJA 1964 makes it mandatory for the Appellate Court to revisit the issue if necessary.* (Emphasis added.)

[29] This is not a case where the documents marked as ID documents were not tendered through witnesses and were not subject to cross-examination by counsels. The notes of evidence indicate that the contents of these documents were explained by the witnesses, SD2 and SD3, and were even the subject matter of cross-examination by counsel for the appellant. These documents were also put to the appellant's sole witness as seen in the excerpts referred to earlier.

[30] Therefore, I am of the opinion that I am empowered under law, in particular, ss 69 and 23 of the Courts of Judicature Act 1964 to now consider

these documents that were earlier marked as IDD1 to IDD14 as part of the exhibits. I also hold that these documents were correctly considered by the learned sessions court judge.

[31] I am also of the view that the rule as laid down by the courts in *Joseph Thambirajah v Bank Buruh (M) Bhd* [2008] 2 MLJ 773 and *Soo Hong & Leong Kew v UMBC* [1997] 1 MLJ 690; [1997] 2 CLJ 548, do not apply to the facts at hand. As stated earlier, these documents were presented through witnesses and were subject to substantial cross-examination by both sides. Therefore, there was a substantial opportunity to test the authenticity and validity of these documents as the makers, ie, SD2 and SD3 were called.

[32] Furthermore, s 73A(2) of the Evidence Act 1950 provides discretionary powers to Court to admit statements made in a document even if the maker was not called. This power may be exercised if the court is satisfied that the undue delay and expense would be caused if the maker is strictly required to give evidence. I also refer to *Arab-Malaysian Merchant Bank Bhd v Chong On Foh Medical Hall* [1997] 4 MLJ 532 and *Sin-Kung Logistics (KL) Sdn Bhd v Projek Lebuhraya Usahasama Bhd* [1997] 1 MLJ 690; [2019] 10 CLJ 137.

[33] Therefore, I opine that the said evidence should have been marked as exhibits as they were admissible under s 73A(2) of the Evidence Act 1950. This will be applicable even if the appellant's contention were correct that the headmasters of each school should have been called to give evidence. To insist on such evidence to be tendered would be unnecessarily cumbersome and would have caused undue delay. Especially when the persons who were privies to that information, SD2 and SD3, were also called to give evidence and subject to cross-examination by the appellant's counsel.

[34] I have also considered the judgments of the courts in *Abdul Kudus Hj Abd Aziz v Normah bte Chik* [2003] 6 MLJ 169, *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377 and *Imam-Ud-Din v Sri Ram Perbhu Dial* (AIR) 1928 Label 142 and the passage from *Evidence, Practice and Procedure* (3rd Ed) by Augustine Paul that are relied on by the appellant. However, these authorities do not detract from the power of the courts to allow these documents and mark them as exhibits under s 73A.

[35] The issue as to the admissibility or consideration of IDD1 to IDD14 evidence as contended by the appellant does not justify any appellate interference on my part.

[36] Given the above, as there are documentary and adequate oral evidence to support the decision of the learned sessions court judge, I find that it would be inappropriate for this court to intervene in this case. I could not hold that

A the decision of the sessions court is one that no reasonable judge could have made. The finding of the learned sessions court judge was supported by evidence and oral testimony of witnesses and he chose to accept the evidence of SD2 and SD3. Therefore, it is not appropriate for this court to exercise its appellate powers and intervene in the said finding of fact.

B

[37] As such I find that the respondents have shown that on the balance of probabilities that the appellant did commit breaches of contract that justifies the exercise of the second respondent's right to deduct 20% of the sums to be paid to the appellant according to cl 12.1 and 12.2 of the Agreement.

C

Whether the decision of the Federal Court in Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd [2019] 6 MLJ 15; [2019] 2 CLJ 723 *is applicable — Grounds 5 and 6*

D

[38] The appellant contends that the decision of the Federal Court in *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* does not apply to this case and relies on the previous decision of the Federal Court in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817; [1995] 2 CLJ 374 and *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445; [2009] 4 CLJ 569.

E

[39] It was contended that the decision in *Cubic Electronics Sdn Bhd v Mars Telecommunications Sdn Bhd* is a departure from the previous position adopted by the previous Federal Court. As such, the appellant contended two arguments based on pre-and post-*Cubic Electronics*.

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[40] Unfortunately, I am unable to agree with the arguments posed by the appellant. The Federal Court in *Cubic Electronics Sdn Bhd* did not make any new law but merely explained the workings of s 75 of the Contracts Act 1950. The court did not overrule the previous decisions of the Federal Court and did not hold that these cases as not being applicable post *Cubic*.

G

[41] Richard Malanjum CJ Sabah and Sarawak (as he then was) stated:

H

> [60] Now, reverting to the local position, s 75 of the Act has done away with the distinction between liquidated damages and penalties (*Linggi Plantations* at p 92) as previously understood under English law (see Visu Sinnadurai, *Sinnadurai Law of Contract*, 4th Ed, (Malaysia: LexisNexis, 2011) at p 1117 quoting the Indian Supreme Court decision in *Fateh Chand v Balkishan Das* 1963 AIR 1405).
>
> ...
>
> [65] With respect and for reasons we shall set out below, we are of the view that there is no necessity for proof of actual loss or damage in every case where the innocent party seeks to enforce a damages clause. Selva Kumar and Johor Coastal should not

I

be interpreted (as what the subsequent decisions since then have done) as imposing a legal straightjacket in which proof of actual loss is the sole conclusive determinant of reasonable compensation. Reasonable compensation is not confined to actual loss, although evidence of that may be a useful starting point.

...

[74] In summary and for convenience, the principles that may be distilled from hereinabove are these:

(a) if there is a breach of contract, any money paid in advance of performance and as part-payment of the contract price is generally recoverable by the payer. But a deposit paid which is not merely part payment but also as a guarantee of performance is generally not recoverable;

(b) whether a payment is part-payment of the price or a deposit is a question of interpretation that turns on the facts of a case, and the usual principles of interpretation apply. Once it has been ascertained that a payment possesses the dual characteristics of earnest money and part payment, it is a deposit;

(c) a deposit is subject to s 75 of the Act;

(d) in determining what amounts to 'reasonable compensation' under s 75 of the Act, the concepts of 'legitimate interest' and 'proportionality' as enunciated in Cavendish are relevant;

(e) a sum payable on breach of contract will be held to be unreasonable compensation if it is extravagant and unconscionable in amount in comparison with the highest conceivable loss which could possibly flow from the breach. In the absence of proper justification, there should not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party;

(f) *s 75 of the Act allows reasonable compensation to be awarded by the court irrespective of whether actual loss or damage is proven. Thus, proof of actual loss is not the sole conclusive determinant of reasonable compensation although evidence of that may be a useful starting point;*

(g) *the initial onus lies on the party seeking to enforce a damages clause under s 75 of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any; and*

(h) *if there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause including the sum stated therein is unreasonable.*

[42] The learned sessions court had correctly applied the law on this issue as seen in the following excerpts:

> [28] Seterusnya, adalah menjadi beban kepada pihak plaintif untuk membuktikan bahawa potongan yang dibuat oleh defendan adalah tidak munasabah dan di dalam kes ini, mahkamah mendapati bahawa pihak defendan telah gagal untuk membangkitkan atau memplid di dalam pliding dan sepanjang perbicaraan isu bahawa kadar denda yang dikenakan ke atas defendan adalah tidak munasabah melainkan isu potongan yang melebihi 20 peratus pada bulan-bulan tertentu yang mana ianya telah dijelaskan oleh SD2 dan SD3 bahawa ianya adalah kiraan bawaan kedepan untuk potongan pada bulan sebelumnya.
>
> [29] Mahkamah juga mendapati bahawa jumlah pemotongan 20 peratus daripada bayaran bulanan tersebut yang berjumlah RM281,000.92 adalah munasabah dan tidak melampau berdasarkan nilai keseluruhan perjanjian tersebut yang berjumlah RM3,656,832.00 dan ianya juga tidak melebihi daripada jumlah yang telah ditetapkan di dalam perjanjian tersebut.
>
> [30] Akhirnya, mahkamah berpendapat bahawa defendan-defendan berhak untuk membuat potongan tersebut berdasarkan klausa 12 perjanjian tersebut.

Issue of reasonableness of the deductions

[43] I note that the appellant also argues that the learned sessions court judge did err when he stated that the appellant had failed to plead the issue of reasonableness. I agree that this was erroneous on the part of the learned sessions court judge. The appellant did amend to add the issue of reasonableness in its statement of claim on the eve of the trial. The respondents did not amend its defence but relied on the denial that appears in para 7 of its defence. However, this issue does not justify appellate interference.

[44] The appellant must note that the learned sessions court judge did state that he had considered the evidence of SD2 and SD3 and considering the value of the contract, the sums deducted were reasonable. Again, it is not for this court to intervene under these circumstances. I find that the appellant has failed to show that the decision was so perverse that no reasonable judge could have made the same finding.

[45] On the issue of the respondents not amending its defence because of the late amendments by the appellant, I find that this is inconsequential. The pleadings as it stands does show that the respondent did deny the appellant's allegation which appears in para 7 of their defence. The argument posed by the appellant does not hold water in the circumstances of this case.

[46] Finally, as seen in *Cubic Pacific*, it is for the appellant to show to court that the deductions made by the respondents were not reasonable. Once the court is satisfied that the first respondent has shown the default of the terms of

the agreement and the existence of the liquidated damages clause, it is for the appellant to show that the said deductions were not reasonable in the circumstance of the case.

[47] On this issue, the learned sessions court accepted that the said deduction was reasonable considering the amount of the contract and was made in the accordance with the terms of the contract.

[48] As stated earlier, the burden of proof to show that the said deduction was not reasonable lies with the appellant. I do not see any basis for any form of judicial interference in this case. The appellant has not shown why it was not reasonable and why the learned sessions court judge got it wrong in this case. The substance of the appellant's arguments on this point lies substantially on pleadings and as I have explained earlier, its position was erroneous.

CONCLUSION

[49] I am grateful to have had the opportunity to read the judgment of Anand Ponnudurai JC in *TH Properties Sdn Bhd & Anor v Knight Frank Malaysia Sdn Bhd* [2021] MLJU 202; [2021] 1 LNS 134 where he summarised the law on appellate jurisdiction. It is worth reiterating the legal position at this juncture when considering the issues raised by the appellant:

> [21] The law regulating appellate intervention especially in matters that are fact sensitive are trite in that the appellate court must be satisfied that the findings are clearly wrong and cannot be justified on the available evidence (see: case of *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1993] 2 CLJ 146).
>
> [22] Foremost on my mind are the two tests, namely, 'plainly wrong' test and 'insufficient judicial appreciation of evidence' test for appellate interference in a subordinate Court's finding. In respect of the two tests, the Court of Appeal held as follows in *Lee Ing Chin @Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 at 98–99:
>
> > (2) Generally, an appellate court will not intervene unless the trial court was shown to be plainly wrong in arriving at its decision or where there had been no or insufficient judicial appreciation of the evidence. Judicial appreciation of evidence meant that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. Where contemporaneous documents existed, he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against these. He must also test the evidence of a witness against the probabilities of the case. The principle central to appellate interference is that i decision arrived at by a trial court without judicial appreciation of the evidence may be set aside on appeal.'

[23] The Court of Appeal has reiterated in *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors and another appeal* [2019] MLJU 38; [2019] 1 LNS 26; [2019] 3 MLRA 322 at 329 that:

> [125] We are mindful of the limited role of the appellate court in relation to the findings of facts made by the court of first instance. The general principle is that the conclusion of a trial judge is a finding of fact on the oral evidence based on the demean our and credibility of the witness before him or her. Generally, such finding ought not be disturbed unless the appellate court is convinced that it is plainly wrong. It would not be sufficient to warrant an appellate interference merely because the appellate court entertains doubt whether such finding is right.

[24] In the more recent case of *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1, after having looked at the various cases relating to the extent of intervention of an appellate court, the Federal Court concluded that an appellate court should not interfere with factual findings of a trial judge unless it was satisfied that the decision of the trial judge was plainly wrong or one that no reasonable Judge could have reached. If it is not, the fact that the appellate court may have reached a different conclusion on the facts, is irrelevant.

[50] I do not find any reason to interfere in the decision of the sessions court on the ground raised by the appellant as stated in the preceding paragraphs. The decision of the learned sessions court judge was backed with sufficient oral and documentary evidence.

[51] Given the above, I do not believe that the decision of the learned sessions court judge was plainly wrong and that no judge could have reached the same conclusion.

ORDERS BY THIS COURT

[52] Given the above, I hereby dismiss the appeal with costs of RM10,000 subject to allocator.

Appeal dismissed with costs of RM10,000.

Reported by Ahmad Ismail Illman Mohd Razali